Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Implementation of Section 621(a)(1) Of The Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection And Competition Act of 1992	**MB Docket No. 05-311**

COMMENTS OF

INSTITUTE FOR POLICY INNOVATION

I. Introduction

The Institute for Policy Innovation (IPI), is a nonpartisan, free-market public policy think tank based in Dallas, Texas. Now in its nineteenth year, IPI specializes in issues of economic and technology policy.

The Commission has asked for public comments on its proposed rulemaking procedure on telecommunications franchise reform, specifically regarding (a) the Commission's authority under Section 621(a) of the Communications Act of 1934 ("Communications Act") to intervene when local franchising authorities "unreasonably refuse to award an additional competitive franchise"; and (b) the current state of play for telecommunications competition, particularly in broadband and video, including evidence of the market impact to be expected from greater competition and more rapid entry of new competitors into franchised markets.

As IPI is proud to be based in Texas, we devote a considerable portion of our comments to the law Texas enacted in 2005 in an effort to streamline, simplify, and deregulate our state's market for telecom services. We suggest, *inter alia*, significant ways in which the new Texas law is an appropriate model for the Commission to consider in its own rulemaking under Section 621(a) of the Communications Act. Further, IPI suggests in general terms the proper legal and regulatory framework for the Commission to use in formulating its decisions in this area of vital importance to both the national economy and states and localities.
Briefly stated, it is our view that the Commission has the proper authority to, and as a matter of policy should, adopt rules under Section 621(a) to ensure that the local franchising process encourages video competition and broadband deployment that will enhance consumer welfare by reducing barriers to entry for all competitors seeking to

offer video and broadband services, and thereby also facilitate a new wave of technological and service innovation in telecommunications.

II. Authority of the Commission

In our federal system of government there always is, and should be, a certain amount of tension between the exercise of national regulatory power (e.g. the Commission here) and the powers exercised by states and localities either pursuant to statutory law or under the common law as it has been adapted to modern circumstances. The Commission correctly noted in its Notice of Proposed Rulemaking released November 18, 2005, that it has presumptive power under the Communications Act to preempt state and local rules, regulations and laws inconsistent with that Act's objectives of promoting and enhancing competition nationwide in telecommunications services. As the Commission also noted, the Communications Act also acknowledges the important and historic role of the municipal franchising process for market entry, subject to the 'unreasonableness' standard in the Act where local franchising authorities fail to award new franchises and thereby promote competition for the benefit of consumers.

The issue for the Commission then may be less one of power, as the power of Congress to establish the Communications Act pursuant to its constitutional authority over interstate commerce is not seriously in question. The real issue is, how best can the Commission *exercise* its duly-granted powers under the Communications Act to balance the interests of consumers nationally, public and civic concerns locally, and telecommunications providers of all types—cable, broadband, wired, wireless, etc. In seeking to strike the correct balance under Section 621(a), the Commission would be well advised to review the recent experience of the State of Texas in dealing with a similar 'balancing test' in freeing up the telecommunications market from excessive and obsolete regulatory structures.

III. The Texas Model

Last year Texas adopted what is essentially a statewide franchising system for telecom providers. In so doing, our state legislature invested significant time and effort to determine which provisions of traditional municipal franchising were most important as a matter of public policy, with due regard for the revenue and control concerns of municipal governments. That statewide franchise model, now the law in Texas, is a very useful and relevant framework for the Commission to use in establishing its own baseline standards for what types of impediments to new franchises are 'reasonable' or 'unreasonable'. Statewide franchise requirements under the new Texas law do not directly track with the plain language of 621(a)(4), and as in any legislative process, represent to some extent an uneasy compromise between state, municipal, and industry leaders. For this reason alone, IPI suggest that the commission look to the provisions of the Texas Statewide Franchise as a sort of 'outermost boundary' for defining what is reasonable in terms of granting new franchises. The Commission would do well to consider a rule to the effect that any local franchising authority (LFA) which attempts to impose conditions or restraints more onerous than those which are permitted in Texas' statewide franchise law be presumptively deemed ‘unreasonable’, within the meaning of Section 621(a), in declining to grant a competing cable franchise. Texas also gives proper weigh to the traditional role of LFAs: its new franchise law preserves municipal police powers over public rights of way, guarantees 5 percent franchise fees for municipalities, adopts by reference the customer service standards in 47 CFR Section 76.309(c), ensures that all service providers will provide adequate capacity to Public, Educational, and Governmental programming, eases the requirements for individuals and families to qualify for lifeline rates, and provides for in-kind payments to match the contributions of incumbent service providers, or an additional 1 percent of revenues in those areas where there is not currently an incumbent provider.

IV. The Impact of Franchise Reform in Texas

Two years ago IPI moved its offices to a different building, and discovered after the move that cable service was not offered to our new building, although it was available in the building next door. Now, it is important for a public policy think tank to have access to CSPAN, etc., to monitor developments on Capitol Hill and in the regulatory agencies. IPI contacted the local cable company to see if we could get cable service to our building, but were told that we could not: the cable provider simply didn’t think it would get enough customers to make it worthwhile. IPI then turned to satellite for video services.

Now, two different providers of video services certainly qualifies as competition, but for obvious reasons a third competitor would have been welcome. Thanks to telecom franchise reform in Texas, that competition is becoming a reality. Today, telecom companies are able to offer video over broadband, and this third source of competition has the potential to revolutionize the video market in the Dallas area, for the benefit of consumers.

At least in Texas, there is no doubt that this new video competition was long held back by the archaic system of local video franchises, which the established cable industry itself has complained about for years. Municipalities in some cases became experts at extortion when negotiating or renegotiating franchise agreements. For example, city and county buildings all over the nation are full of ‘dark’ fiber and unused (and unneeded) circuitry that cable companies were compelled to install in those buildings as an explicit or explicit condition for obtaining or renewing a local franchise.

As time marched on, the only real remaining justification for the franchise system as we know it was the awarding of monopolies. The Commission clearly understands that the notion of a ‘natural monopoly’ in telecommunications services, including video services, has been obsolete for a long time. With new competition from telecom companies, it is increasingly urgent to give the *status quo* franchise system a drastic overhaul, and to allow fierce and aggressive competition and speedy rollout of broadband technology.

When the Texas legislature its franchise reform legislation last year, it chose to allow any video provider, not just telecom companies, to obtain a franchise on a statewide basis, rather than having to negotiate franchises jurisdiction-by-jurisdiction. The revenue formula for localities remains untouched, so municipalities cannot complain that their revenues are being harmed.

The result has been immediate. All over the greater Dallas area, there are signs up explaining that sidewalk is under construction because, e.g., Verizon is rolling out its fiber-to-the-home network. The broadband rollout is happening, right now, in Texas, and it is uncanny how quickly things accelerated once Texas deregulated the video franchise business. Not only does this prove that opening up the franchise works, it proves that the existing franchise system truly did impede vitally important new competition.

These new competitors bring with them a critical economic commodity: new investment. New capital is flowing into Texas, and it is creating new jobs. This new investment will also bring new tax revenue into the state's coffers. This is the right kind of revenue increase: not simply raising the tax burden on existing entities, or subjecting them to unfair competition, but actually raising new revenue through economic growth.

Franchise reform in Texas also paid due regard to those truly in need. Under that reform, it is easier for people to qualify for lifeline rates, which is as it should be. There is no reason to regulate an entire industry to protect a small subset of the population for which we have legitimate concerns. Instead, protect the target population and free the rest of the market.

V. Some Particular Features of the Texas Franchise Reform

Timing of Franchise Approval
The Local Franchise Authority must notify an applicant whether its application is complete before the 15th business day after the application is submitted and issue a ruling on the franchise application before the 17th business day after it receives a completed affidavit.

Administrative Requirements of Franchisee
Franchisee must:
Sign an affidavit affirming that the applicant will timely file all forms required by the FCC;
Comply with all applicable federal, state, and local requirements;
And provide a description of the service area it intends to serve.
The description of a service area may be updated as needed.
Certificates of franchise authority are fully transferable and may be terminated by the recipient.

Franchise Fees
Franchisees shall pay each municipality in which they provide service a franchise fee equal to 5 percent of gross revenues from video services.

The franchise fee payable under this section is to be paid quarterly, within 45 days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the fee. A municipality may review the business records of the cable service provider or video service provider to the extent necessary to ensure just compensation. Each party shall bear the party's own costs of the examination. A municipality may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.
Providers may recover any franchise fee from its customers.

In-kind Contributions
Franchisees are required to make cash payments to municipalities equal to, on a pro rata basis, such in-kind payments made by incumbent cable operators within the municipality, until the date the incumbent cable operator's locally issued franchise expires. Afterward, holders of state-issued certificates of franchise authority will pay an amount equal to 1 percent of gross revenues from video services or, at the municipality's option, a per subscriber fee paid under the expired locally issued franchise, in lieu of in-kind payments.

PEG Channels
Franchisees shall provide no fewer public, educational, and governmental (PEG) access channels than are provided by an incumbent cable operator as of September 1, 2005. If a municipality does not have any PEG channels as of that date, the bill requires the furnishing of up to three PEG channels, depending on the population of the municipality. The bill delineates the obligations and responsibilities of municipalities and holders of state-issued certificates of franchise authority with respect to PEG channels. Municipalities may establish reasonable guidelines regarding the use of PEG channels. A court of competent jurisdiction has exclusive jurisdiction to enforce any PEG requirement.

Anti-Discrimination
The Franchisee may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.
Franchisees shall have a reasonable period of time to become capable of providing service to all households within a designated franchise area, and this requirement may be satisfied through alternative technologies providing comparable content, service, and functionality.

Municipalities Retain Police Powers Over Their Rights of Way
Municipalities retain the authority to enforce police-power regulations in the management of public rights-of-way, provided that those regulations are competitively neutral and reasonable.
Municipalities may not discriminate against holders of state-issued certificates of franchise authority with respect to use of rights-of-way, building access, or pole attachment terms. The bill places additional limitations on municipalities' authority with respect to office location requirements, reports, inspections, transfer of ownership, or

insurance requirements. Municipalities may continue to require holders of state-issued certificates of franchise authority to register with the municipality, maintain a point of contact, and obtain construction permits. The PUC shall have no jurisdiction to review municipalities' police-power regulations to manage rights-of-way.

Franchisees Must Meet Federally Established Customer Service Standards

(1) Cable system office hours and telephone availability –

(i) The cable operator will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week.

(A) Trained company representatives will be available to respond to customer telephone inquiries during normal business hours.

(B) After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.

(ii) Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis.

(iii) The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.

(iv) Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time.

(v) Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

(2) Installations, outages and service calls. Under normal operating conditions, each of the following four standards will be met no less than ninety five (95) percent of the time measured on a quarterly basis:

(i) Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system.

(ii) Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem.

(iii) The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)

(iv) An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

(v) If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

(3) Communications between cable operators and cable subscribers –

(i) Refunds -- Refund checks will be issued promptly, but no later than either –

(A) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or

(B) The return of the equipment supplied by the cable operator if service is terminated.

(ii) Credits -- Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

Indemnity for Municipal Employees and Officials

The franchisee shall indemnify and hold a municipality and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought, that is found by a court of competent jurisdiction to be caused solely by the negligent act, error, or omission of the holder of a state-issued certificate of franchise authority or any agent, officer, director, representative, employee, affiliate, or subcontractor of the holder of a state-issued certificate of franchise authority or their respective officers, agents, employees, directors, or representatives, while installing, repairing, or maintaining facilities in a public right-of-way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the municipality or its officers, employees, contractors, or subcontractors. If the holder of a state-issued certificate of franchise authority and the municipality are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the municipality under state law and without waiving any defenses of the parties under state law.

The franchisee and a municipality shall promptly advise the other in writing of any known claim or demand against the holder of a state-issued certificate of franchise authority or the municipality related to or arising out of the holder of a state-issued certificate of franchise authority's activities in a public right-of-way.

VI. Impact of Competition

Above IPI has documented with anecdotal evidence that, at least in Texas, state intervention to free up the franchise, while giving due regard to the historic and important role of municipalities in safeguarding local concerns and community values, does indeed spur immediate competition and advance consumer welfare. This impact may be seen beyond Texas, however. According to Bank of America Equity Research, incumbent service providers in Texas, Florida, and Virginia where new franchise authority has been given to the Verizon FIOS service, have begun to offer much more competitive rates to the local customers for both bundled and unbundled services. In Temple Terrace, Florida for example, the FIOS charge of $109.85 for a ‘triple bundle’ (video, high speed internet, and internet telephony) brought a competitive rate of $109.00 from the legacy provider, which otherwise was advertising a rate of $143.35 for the same bundle. A study prepared just last month by Citigroup Equity Services indicates that in the short run, the trend is toward increased competition and lower pricing structures: Citigroup notes that “With most consumers still purchasing services from providers that charge higher prices, we see potential for upheaval, and churn, across all communications and video services. In part, this reflects a more pervasive deployment of cable voice and telco video.”

One does not wish to extrapolate from a few sets of data and anecdotal evidence to ‘prove’ that reducing barriers to entry through franchise reform improves competition, enhances services, and lower prices. We do know the laws of economics, however, and we know that market competition is the key to benefiting consumers, first, last, and always. Companies do not do things without a good reason. Companies do not invest in rolling out broadband without a reason to do so, and there is no doubt that the existing panoply of municipal franchise regulations has put a great deal of friction in the market, raising costs, delaying rollouts, and impeding competition. Now, the opportunity to compete with cable for video customers gives the telecoms the reason to aggressively rollout and price broadband.

From this standpoint, it is ironic that legacy cable companies are in some cases demanding that the telecom companies as ‘new entrants’ to their markets be required immediately to offer their services everywhere, geographically speaking, and to not roll out their new offerings in a strategic manner. That is not a level playing field: it is another argument for slowing the entry of new competitors, who cannot reasonably be asked (after years of delay, in many cases, due to municipal franchise rules) to suddenly go full speed ahead. In this critical are we hope the Commission will adopt a rule of reason, recognizing that while some municipalities may have particular reasons to negotiate some aspects of rollout plans with new entrants to the video market, it is inherently ‘unreasonable’ within the meaning of Section 621(a) for those municipalities to impose a requirement of immediate full-scale build-out.

VII. Conclusion: The Matrix Model of Preemption

The Commission has rightly raised and asserted its power under federal law to preempt municipalities who use their franchise powers to unreasonably delay and obstruct, and therefore in effect deny, local market access to telecommunications service providers who are ready and willing to serve the public. As IPI has always tried to point out, it remains important for the nation to have a nuanced regulatory regime that fosters a national competitive market in advanced technology services, a regime that still gives due deference to local concerns over the quality, cost, and public interest vested in telecommunications service. We believe Texas has done an excellent job in adopting such a nuanced regime at the state level, a sort of ‘matrix model’ where the state has adopted overall authority to expedite and rationalize the franchising process while retaining municipal authorities as critically important players in the system. While the Texas model may not be directly scalable to the Commission's task of setting national policy, it has many features that we believe will greatly help inform that task.

The communications industry has changed. Today, the digital revolution has forced telecom companies to become competitors, but both they and the legacy providers will be strong new competitors if the Commission does its task here well. By exercising your authority under Section 621 in decisive and thoughtful manner, the Commission will not only provide consumers with enhanced choices and options in the video business, it will foster the creation of new services and innovations we can only imagine today.

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